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УДК 341.3(6-15/-17)''1973/91''

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CONFLICT IN THE WESTERN SAHARA FROM THE POINT OF VIEW OF INTERNATIONAL HUMANITARIAN LAW

Стаття присвячена оцінці конфлікту в Західній Сахарі з позицій міжнародного гуманітарного права, а також особливостям дотримання норм даного розділу міжнародного права в ході згаданого конфлікту. У ході дослідження були використані міжнародні документи, в яких містяться основні положення міжнародного гуманітарного права. Піддаючи аналізу події, що мали місце, та посилаючись на згадані вище документи й на вже існуючі праці вітчизняних та зарубіжних дослідників, автор дає правову оцінку конфлікту в Західній Сахарі на кожному з етапів його активної фази, що тривала з 1973 по 1991 роки.

Статья посвящена оценке конфликта в Западной Сахаре с точки зрения международного гуманитарного права, а также особенностям соблюдения норм данного раздела международного права в ходе указанного конфликта. В ходе исследования были использованы международные документы, в которых содержатся основные положения международного гуманитарного права. Анализируя ход событий, и ссылаясь на упомянутые выше документы и на уже существующие работы отечественных и зарубежных исследователей, автор дает правовую оценку конфликта в Западной Сахаре на каждом из этапов его активной фазы, продлившейся с 1973 по 1991гг.

This article is dedicated to the evaluation of the conflict in the West Sahara from the point of view of international humanitarian law, and in particular to the observance of the standards of this division of international law in the course of this conflict. In the framework of the study there were used international documents, containing the basic conditions of international humanitarian law. Analyzing the course of events, and referring to the above-mentioned documents and to the exist-

ing works of domestic and foreign researchers, the author gives the legal estimation of the conflict in the West Sahara for each of the stages of its active phase, which lasted from 1973 until 1991.

The Western Sahara conflict is one of the most sharp and protracted modern regional conflicts. The problem of Western Sahara became an intractable knot of contradictions among main participants of the conflict, namely: Spain, France, the Kingdom of Morocco, Islamic Republic of Mauritania, the POLISARIO Front as the representative of the partially recognized state Sahrawi Arab Democratic Republic (SADR) and the People's Democratic Republic of Algeria. It affects negatively the whole system of modern international relations and possesses threats to the stability of Maghreb region.

While all international armed conflicts are connected to military actions and thereby to the direct threats to the people's lives it is essential to stick to the rules which were created to protect those not involved directly in the hostilities and to diminish human cost of the conflicts. It is important to emphasize that usually attention of the researchers is being drawn to such aspects of the conflict in Western Sahara as its origins and outcomes and to the political component of the conflict without examining its course from the point of view of International Humanitarian Law (IHL) observance. Thus main tasks of this paper are the following: to discover whether the resort to arms by the parties to the conflict was legal, to uncover their motivations during the course of the conflict, to give legal assessment of the way the parties conducted their military actions and to examine the outcomes of the active phase of the conflict.

The conflict in Western Sahara went a long way from 1973 when the struggle between POLISARIO Front and Spanish colonialist government broke out and 1976 when representatives of self-proclaimed SADR began guerilla war against two occupying states till 1991 when hostilities came to an end. Thus the status of the conflict evolved from the purely non-international (as defined in Article 1 of the Additional Protocol II to the Geneva Conventions) [1] struggle for independence between national liberation movement and colonialist authorities which is covered by the provisions of Common Article 3 of Geneva Conventions [2] and Additional Protocol II to the Geneva Conventions [7] to the situation of international conflict in the period of hostilities with occupying Mauritania in which French forces took part and to which provisions of Additional Protocol I to the Geneva Conventions are to be applied [8]. The period between 1979 and 1991 which was characterized by ongoing clashes between POLISARIO Front and Moroccan military forces received completely different assessment from the point of view of parties to the conflict. The position of official Rabat is based on nonrecognition of SADR as an independent state and

of POLISARIO Front as self-sufficient and independent actor. «Without Algeria's diplomatic, financial, military and territorial support, it argues, there would be no «Sahara Question». Algeria, it believes, uses POLISARIO and the conflict as a whole to weaken its potential rival in the Maghreb» [13]. Hence we can conclude that under the Moroccan understanding the conflict can be classified to some extent as an international one.

According to the POLISARIO Front the Western Sahara conflict first of all is the matter of self-determination of the Sahrawi people. Taking into consideration that POLISARIO poses itself as a representative of the independent SADR state and considers the Kingdom of Morocco to be the occupying country, then in this case the ensuing situation is to be understood as the international conflict to which the law of international armed conflicts is to be applied. But the whole picture is being complicated by the fact that SADR is the self-proclaimed state which hasn't yet received full international recognition and that is why the application of specific provision of International Humanitarian Law (IHL) can raise disputes.

Considering *jus ad bellum* it has to be emphasized that from the very beginning of the conflict Morocco failed to meet the criteria which could reason its occupation of Western Sahara and its war with POLISARIO Front. The «Green March» itself was clearly aimed to force Spain to negotiate the transfer of the territory to Morocco. On 6th November 1975 the United Nations Security Council condemned the «Green March» and issued Resolution 380 which called for its immediate withdrawal [12]. Nevertheless Morocco completely ignored this decision of the Security Council. As it is stated by Jacob Mundy (holder of PhD from the Institute for Arab and Islamic Studies of Exeter University, UK): «Morocco's flagrant disregard of Security Council Resolution 380, its armed invasion, and its use of thousands of civilians to coerce Spain to negotiate, all amounted to a severe violation of the UN Charter's most fundamental constraints against the use of force in international affairs» [5]. Thus Moroccan activities can be considered an act of aggression which violate the basic principles of the international law.

As for the observation of the provisions of International Humanitarian Law by the parties to the conflict, it should be admitted that there has been no grave breaches reported and parties did not accuse each other in this respect. There is no precise information on the actual number of victims of this conflict. The biggest human cost to the local population is connected to the significant population displacement due to the territories split into two separate entities. The number of 50,000 (which has now tripled) Saharan refugees had fled Western Sahara due to Moroccan occupation. The bulk of these refugees lives at the Algerian territory around the city of Tindouf.

Above-mentioned statistical data is presented by POLISARIO Front and is usually being disputed by Morocco but since international institutions have never had the possibility to provide a census they adopted the numbers of POLISARIO.

Another problem is represented by the landmines. According to Geneva Call organization «between five and ten million mines can be found around the wall with additional two to five million throughout the affected region, including Moroccan- and POLISARIO-controlled areas, as well as Algeria and Mauritania. There are no solid figures for deaths due to mines, but Landmine Monitor has estimated them at several dozen since the 1991 ceasefire» [13]. It is important to admit in this respect that Morocco became the party to the «Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices» only on 19th March 2002 [9].

One of the peculiarities of the application of IHL in case of Western Sahara conflict is that the parties to the conflict are not equal in terms of legal treatment of their status. Since SADR is the partially recognized country it is not the party to Geneva Conventions [10] or Hague Conventions [6] which were, at the same time, signed by Morocco. Thus SADR and POLISARIO Front as its main political and military force are bound basically only by the provisions of customary law.

Thus, since Morocco occupied the territory of Western Sahara without having any lawful basis for demanding these areas which was confirmed by the advisory opinion of the International Court of Justice of 16 October 1975 [4], the conflict in Western Sahara represents clear act of aggression and gross violation in terms of *jus ad bellum*. Nevertheless the state of occupation comes into force since the occupying country is able to exert its power and control over the occupied territory regardless of whether or not the invasion was justified. On the other hand all the provisions of IHL or *jus in bello* are fully applicable to the conflict. «It is worth noting that Morocco has explicitly recognized the applicability of IHL to the Western Sahara conflict. On several occasions, the Moroccan government petitioned the International Committee of Red Cross on the issue of Moroccan POWs held by POLISARIO past the 1991 cease-fire» [5].

There have been no gross infringements of the cease-fire agreement during last two decades. The ensuing situation is being characterized as peaceful with no signs indicating a possible resumption of hostilities between the parties. But on the other hand some scholars admit that the situation of «not peace, nor war» can't be preserved for a long period of time and further inability to conduct a referendum which will determine the status of the territory can bring about increase of tensions in the region and provoke new military clashes.

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